

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE:

KIND LLC "HEALTHY AND ALL NATURAL"  
LITIGATION

**MEMORANDUM AND ORDER**

15-MD-2645 (NRB)  
15-MC-2645 (NRB)

*This Document Relates to All Actions*

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**NAOMI REICE BUCHWALD**  
**UNITED STATES DISTRICT JUDGE**

This case arises out of a challenge to the labelling on certain snacks sold by KIND LLC ("KIND"). Plaintiffs are individuals who purchased KIND products displaying an "All Natural/Non GMO" label, who allege that the label was deceptive or misleading.<sup>1</sup> This label was discontinued by 2017. While plaintiffs initially challenged numerous claims that appeared on the labels of KIND products, the only issue remaining in this litigation is whether certain KIND products are properly described as "All Natural." Plaintiffs seek damages on behalf of themselves and three classes, pursuant to New York's General Business Law ("GBL") §§ 349 and 350; California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq., Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq., and False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, et seq.; and Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA")

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<sup>1</sup> "GMO" is an abbreviation for "genetically modified organism."

Fla. Sta. § 501.201, et seq.; and various common law claims. Presently before the Court are: (1) defendant's motion for summary judgment; (2) defendant's motion to decertify the classes; and (3) Daubert motions from both plaintiffs and defendant to disqualify each of the five experts in this case, who testify in support of and opposition to the motion for summary judgment.<sup>2</sup> For the following reasons, defendant's motion for summary judgment is granted, defendant's motions to disqualify the opinions of Dr. Dennis and Dr. Toutov are granted, defendant's motion to decertify the classes is granted, and the remaining motions are denied as moot.<sup>3</sup>

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<sup>2</sup> Specifically, defendant challenges plaintiffs' experts, Dr. J. Michael Dennis, who opines on a reasonable consumer's understanding of "All Natural" and whether the "All Natural" statement was material to consumers, ECF No. 241; Dr. Anton Toutov, who opines on the naturalness of the ingredients in KIND products, ECF No. 244; and Dr. Stephen Hamilton, who opines on whether consumers were injured by the "All Natural" statement, ECF No. 254. Plaintiffs challenge defendant's experts Dr. Ran Kivetz, ECF No. 275, who opines in opposition to Dr. Dennis's and Dr. Hamilton's reports, and Dr. Catherine Adams Hutt, ECF No. 269, who opines in opposition to Dr. Toutov's report.

<sup>3</sup> The parties also submitted briefing regarding whether this Court should consider the supplemental declarations of plaintiffs' experts Stephen Hamilton, J. Michael Dennis, and Anton Toutov submitted in connection with the pending motion for summary judgment. ECF Nos. 297, 303. Defendant contends that these declarations contain new expert opinions from plaintiffs' experts that were undisclosed in discovery and should therefore be stricken. ECF No. 297. Plaintiffs contend that these declarations simply "reinforce" the opinions the experts previously offered. ECF No. 303. The Court agrees with defendant, but finds that, regardless of whether this Court considers the supplemental expert declarations, the Court's conclusions regarding the admissibility of the expert opinions in this action and the merits are unchanged. As such, the issue is moot.

## **I. Background**

### **A. Procedural History**

The present multidistrict litigation ("MDL") has been pending since 2015. Its history is entwined with certain actions of the Food and Drug Administration ("FDA") regarding particular labelling statements. A brief overview of the history of this action and the FDA action prior to the present motions is therefore necessary.

#### **1. The FDA Warning Letter and Lawsuit Commencement**

In March 2015, the Food and Drug Administration ("FDA") issued a "warning letter" triggered by the following "about KIND" statement that appeared on some KIND labels:

At KIND we do things differently and try to avoid false compromises. Instead of "or" we say "and." Healthy and tasty, convenient and wholesome, economically sustainable and socially impactful.

ECF No. 83 at 2. Specifically, the FDA asserted that KIND'S "healthy and tasty" language was an "implied nutrient content claim" subject to regulations set forth in 21 C.F.R. § 101.65, and that certain KIND products did not meet the FDA's saturated fat content requirements necessary to describe food as "healthy." ECF No. 52, Ex. A at 1-2.<sup>4</sup> In response, KIND argued that many universally recognized healthy foods such as almonds, avocados, or

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<sup>4</sup> The FDA did not comment on KIND's use of the phrase "All Natural." ECF No. 52, Ex. A.

salmon contain saturated-fat levels exceeding the limits prescribed by 21 C.F.R. § 101.65. ECF No. 83 at 2. Before any further action from the FDA, numerous “copycat” private lawsuits were filed, alleging that consumers were deceived by the “About KIND” statement, which were later transferred into this MDL. Id. The initial complaints challenged representations displayed on the packaging of the KIND products that claimed the products were “all natural,” “healthy,” “+,” “plus,” and a “good source of fiber” with “no trans fats,” arguing that the products contained little nutritional value, high levels of saturated fat, and genetically modified, synthetic, or other non-natural ingredients. ECF No. 1 at 1-2. These cases were transferred to this District and consolidated in an MDL before the late Judge Pauley. Id.

## **2. The FDA Signals Imminent Rulemaking Regarding “All Natural” Labeling and the Case Is Stayed**

In November 2015, the FDA announced the “establishment of a docket to receive information and comments on the use of the term ‘natural’ in the labeling of human food products, including foods that are genetically engineered or contain ingredients produced through the use of genetic engineering.” Use of the Term “Natural” in the Labeling of Human Food Products; Request for Information and Comments, 80 FR 69905-01, 2015 WL 6958210. These proceedings were based on applications from citizen petitions and “three Federal district courts” seeking guidance on whether certain

products “may be labeled as ‘Natural,’ ‘All Natural,” and/or ‘100% Natural.’” 80 FR 69905-01, 2015 WL 6958210. Following the FDA’s announcement, KIND moved to dismiss the claims against it, or in the alternative, to stay the action pending the FDA’s promulgation of a rule addressing the word “natural” on labels. See ECF No. 65-66. It is somewhat ironic that the spark for the various lawsuits flamed out when in April 2016 – after the briefing of KIND’s first motion to dismiss in this action but prior to oral argument on the motion – the FDA withdrew the objections to KIND products outlined in its warning letter and conceded that its “regulations concerning nutrient content claims are due for a reevaluation in light of evolving nutrition research.” ECF No. 73-5. One month later, plaintiffs voluntarily dismissed their “healthy” claims. ECF No. 74. Judge Pauley granted the stay defendant requested, reasoning that the FDA seemed prepared to address core issues in the case and a stay would reduce the risk of inconsistent outcomes. ECF No. 83 at 7-12. Judge Pauley also dismissed any “Non GMO” claim without prejudice, finding that the plaintiffs had not properly pled a cause of action because they had not alleged that any specific KIND products contained GMOs.<sup>5</sup> Id. at 12-13.

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<sup>5</sup> Judge Pauley noted that it was not entirely clear from the complaint whether plaintiffs’ intent was to file a standalone “Non GMO” claim. ECF No. 83 at 13.

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